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Karen M. Blum*

I. Introduction: *Ashcroft v. Iqbal*

YES, VIRGINIA, THERE REALLY IS SUPERVISORY LIABILITY, but it's complicated. Let me explain. In a case that was about pleading requirements,[1] and a case in which the issue of supervisory liability had not been briefed or argued by the parties,[2] Justice Kennedy, writing for a five-member majority of the Court in *Ashcroft v. Iqbal*,[3] waived a judicial wand and

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1. As Federal Magistrate Judge Jeremiah McCarthy has recently observed, "Unless they have been living in a cave, there are by now no members of the federal bench or bar who are unfamiliar with the changes wrought in the federal pleading landscape by the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly* [550 U.S. 544 (2007)] and *Ashcroft v. Iqbal* [129 S.Ct. 1937 (2009)]." Jeremiah J. McCarthy and Matthew D. Yusick, Twombly *and* Iqbal*: Has the Court "Messed Up the Federal Rules"?*, 2010 FED. CTS. L. REV. 1. There are many scholarly articles addressing the impact of *"Twiqbal"* on pleading. *See, e.g.*, Alexander A. Reinert, The *Costs of Heightened Pleading*, 86 IND. L.J. 119 (2011); Arthur R. Miller, *From* Conley *To* Twombly *To* Iqbal*: A Double Play On The Federal Rules Of Civil Procedure*, 60 DUKE L.J. 1 (2010); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293 (2010); Robert G. Bone, *Plausibility Pleading Revisited And Revised: A Comment On* Ashcroft v. Iqbal, 85 NOTRE DAME L. REV. 849 (2010).

2. As Justice Souter noted in his dissent, Ashcroft and Mueller had conceded that "that a supervisor's knowledge of a subordinate's unconstitutional conduct and deliberate indifference to that conduct" were grounds for *Bivens* liability. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1957 (2009). (Souter, J., joined by Stevens, J., Ginsburg, J., and Breyer, J., dissenting). The issue presented on appeal was whether the allegations of the complaint were sufficient to state such a claim. Because of the concession, the Court "received no briefing or argument on the proper scope of supervisory liability." *Id.*

3. 129 S. Ct. 1937 (2009). The only other case in which the Court has addressed the issue of supervisory liability is Rizzo v. Goode, 423 U.S. 362 (1976), where the Court held that the misconduct of the subordinate must be "affirmative[ly] link[ed]" to the action or inaction of the supervisor. *Id*. at 371.

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purported to make it disappear in § 1983[4] and *Bivens*[5] actions. In *Iqbal*, where the underlying constitutional claim alleged discriminatory treatment of detainees based on race, religion, or national origin,[6] the Court rejected the argument that high-level supervisory officials (Ashcroft and Mueller) could be held individually liable in a *Bivens* action based on "mere knowledge of [a] subordinate's discriminatory purpose."[7] Justice Kennedy proclaimed that "[i]n a § 1983 suit or a *Bivens* action-where masters do not answer for the torts of their servants-the term 'supervisory liability' is a misnomer. Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct."[8] Thus, according to the Court, where plaintiffs allege a claim that requires the showing of discriminatory purpose, plaintiffs must allege and prove that a supervisor himself had the impermissible purpose, not just knowledge of a subordinate's discriminatory purpose, in order to impose liability under § 1983 or *Bivens*.[9]

While the Court used broad language, several factors may arguably limit the ultimate reach of this ruling, at least in terms of its impact on supervisory liability. First, the case challenged government conduct in the immediate wake of 9/11, a time of intense crisis and concern about

4. 42 U.S.C. § 1983 (West, Westlaw through 1996) provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

5. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (holding that an action could be brought against federal law enforcement officials for a Fourth Amendment violation; in the absence of a statutory remedy against federal officials, the Court implied a remedy based directly on the Constitution).

6. Former Attorney General John Ashcroft and Robert Mueller, Director of the Federal Bureau of Investigation, were among high-ranking officials named by Iqbal in a *Bivens* action complaining of harsh treatment and conditions during his confinement in the wake of the terrorist attacks on September 11th, 2001. He claimed that certain detainees were selected to be of "high interest" and treated harshly because of their race, religion or national origin. *Iqbal*, 129 S. Ct. at 1942.

7. *Id*. at 1949.

8. *Id*. As the dissent in *Iqbal* pointed out, the dichotomy the majority assumed between "*respondeat superior* liability" on the one hand or "no supervisory liability at all" on the other, is false. "Even if an employer is not liable for the actions of his employee solely because the employee was acting within the scope of employment, there still might be conditions to render a supervisor liable for the conduct of his subordinate." *Id*. at 1958 (Souter, J., joined by Stevens, J., Ginsburg, J., Breyer, J., dissenting).

9. *Id*. at 1949.

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national security. Second, *Iqbal* was a *Bivens* action, involving claims against very high-level officials of the federal government, whom the Court has historically afforded the highest level of protection from suit. The Court emphasized that implied *Bivens* actions are disfavored and that it is disinclined to extend their reach.[10] While the Court did reference § 1983, there was no discussion or analysis of the fact that the explicit language of that remedial statute provides for liability with respect to those who *cause* constitutional violations, as well as those who commit them. The causation language in § 1983—"every person who . . . subjects, or causes to be subjected"[11]—provides a strong basis for distinguishing the scope of the § 1983 remedy from the *Bivens* common law remedy. Third, *Iqbal* was a case about intentional discrimination, where the underlying claim required a showing of discriminatory purpose to make out a violation. Discriminatory purpose is not required to make out claims of unreasonableness under the Fourth Amendment or subjective deliberate indifference under the Eighth or Fourteenth Amendments.[12]

10. *Id*. at 1948 ("Because implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability 'to any new context or new category of defendants.' ") (quoting Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 68 (2001)).

11. 42 U.S.C. § 1983 (2006).

12. *See, e.g.*, D'Olimpio v. Crisafi, 718 F. Supp. 2d 340, 347 (S.D.N.Y. 2010) ("As *Iqbal* noted, the degree of personal involvement varies depending on the constitutional provision at issue; whereas invidious discrimination claims require a showing of discriminatory purpose, there is no analogous requirement applicable to D'Olimpio's allegations regarding his search, arrest, and prosecution."); Argueta v. United States Immigration and Customs Enforcement , No. 08-1652 (PGS), 2010 WL 398839, at *7 (D.N.J. Jan. 27, 2010) ("In this Court's view, *Iqbal* does not hold that a plaintiff to adequately plead a *Bivens* Fourth Amendment claim must allege more than required to show a violation of the fundamental constitutional right alleged. Several post-*Iqbal* cases have made this important distinction."); Sash v. United States, 674 F. Supp. 2d 531, 544 (S.D.N.Y. 2009) ("Where the constitutional claim does not require a showing of discriminatory intent, but instead relies on the unreasonable conduct or deliberate indifference standards of the Fourth and Eighth Amendments, the personal involvement analysis set forth in *Colon v. Coughlin* may still apply."); Jackson v. Goord, 664 F. Supp. 2d 307, 324 n.7 (S.D.N.Y. 2009) ("In contrast [to *Iqbal*], in this and many other prison-condition cases, the underlying constitutional right of the inmate is to be free of injurious deliberate indifference by their jailers. . . In these cases, then, deliberate indifference by supervisors to known injury-causing conditions should still trigger liability.); Estate of Allen *ex rel*. Wrightsman v. CCA of Tenn., LLC, No. 1:08-cv-0774-SEB-TAB, 2009 WL 2091002, at *3 (S.D. Ind. July 14, 2009) (finding plaintiffs were not to rely "solely on a theory of supervisory liability" where they alleged that Sheriff "did nothing despite knowing that [deceased] and others [in jail] were not receiving necessary medical attention"); Chao v. Ballista, 630 F. Supp. 2d 170, 178 n.2 (D. Mass. 2009) (noting that "the state of mind required to make out a supervisory claim under the Eighth Amendment–i.e., deliberate indifference–requires less than the discriminatory purpose or intent that Iqbal was required to allege in his suit against Ashcroft and Mueller."). *But see* Jacobs v. Strickland, No. 2:08-cv-680, 2009 WL 1911781, at *3 (S.D. Ohio June 30, 2009) (noting that in a complaint alleging violations of RLUIPA and First Amendment based on failure to meet religious dietary requirements, the court held complaint against supervisors must be dismissed even if allegations that "the

Of course, if *Iqbal* does eliminate the concept of supervisory liability[13] and requires the supervisor be held to the same constitutional standard as the subordinate, this principle can arguably work in plaintiffs' favor in some cases. With a Fourth Amendment violation, where the standard is objective reasonableness,[14] consistent with *Iqbal*, a plaintiff might assert a claim against the supervisor by alleging that his or her failure to train (*e.g.*, on the use of a taser) was objectively unreasonable under the circumstances. The problem with such a claim is that it is not clear that objective unreasonableness in failing to train that causes a constitutional violation does, *in itself*, amount to a violation of the Constitution as now required to hold a supervisor liable in a post-*Iqbal* world.

II. Pre-*Iqbal: City of Canton* Causation and Confusion

Virtually every federal circuit court of appeals has recognized a species of supervisory liability based on a failure to train, supervise, or discipline.[15] In his dissent in *Iqbal*, Justice Souter notes the "spectrum of

supervisor ha[d] actual knowledge of the constitutional violation as long as the supervisor did not actually participate in or encourage the wrongful behavior"); Bellamy v. Mount Vernon Hosp., No. 07 Civ. 1801(SAS), 2009 WL 1835939, at *6 (S.D.N.Y. June 26, 2009) (stating that on claim of deliberate indifference to medical needs, the court concluded that "*Iqbal v. Ashcroft* abrogate[d] several of the categories of supervisory liability enumerated in *Colon v. Coughlin* [58 F.3d 865, 873 (2d Cir. 1995)]" and that "a supervisor [was] only held liable if that supervisor participate[d] directly in the alleged constitutional violation or if that supervisor create[d] a policy or custom under which unconstitutional practices occurred"); Levy v. Holinka, No. 09-cv-279-slc, 2009 WL 1649660, at *3 (W.D. Wis. June 11, 2009) (alleging a claim under RFRA; mere knowledge and acquiescence not enough).

Excessive force claims under the Eighth Amendment require a showing of "malicious and sadistic" use of force, and some substantive due process claims will require a showing of "purpose to harm" in order to "shock the conscience." *See* Cnty. of Sacramento v. Lewis, 523 U.S. 833, 836 (1998); Hudson v. McMillian, 503 U.S. 1, 6 (1992).

13. Justice Souter, in dissent, accused the majority of such elimination, at least with respect to *Bivens* actions. *See Iqbal*, 129 S. Ct. at 1956-57 (2009) (Souter, J., joined by Stevens, Ginsburg, Breyer, JJ., dissenting) ("Lest there be any mistake, . . . the majority is not narrowing the scope of supervisory liability; it is eliminating *Bivens* supervisory liability entirely."); *see also Jackson*, 664 F. Supp. 2d at 324 n.7 (S.D.N.Y. 2009) ("A question has arisen as to whether the traditional supervisory-liability test has been eviscerated by the recent Supreme Court decision.").

14. *See, e.g.*, Graham v. Connor, 490 U.S. 386 (1989) (holding that the use of excessive force during an arrest, investigatory stop, or other "seizure" of a free citizen is judged by the objective reasonableness standard of the Fourth Amendment). *See also* Tennessee v. Garner, 471 U.S. 1 (1985) (applying Fourth Amendment standard to use of deadly force to apprehend fleeing suspect); Scott v. Harris, 550 U.S. 372, 382 (2007) ("*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.' *Garner* was simply an application of the Fourth Amendment's 'reasonableness' test to the use of a particular type of force in a particular situation.") (internal citation omitted).

15. *See, e.g.*, Dodds v. Richardson, 614 F.3d 1185, 1196 n.5 (10th Cir. 2010) (collecting pre-*Iqbal* cases from the Circuits); Blankenhorn v. City of Orange, 485 F.3d

463, 486 (9th Cir. 2007) ("While Chief Romero did not personally dismiss complaints against Nguyen, as was the case in *Larez* and *Watkins*, he did approve Nguyen's personnel evaluations despite repeated and serious complaints against him for use of excessive force. That approval, together with the expert testimony regarding the ineffectiveness of Nguyen's discipline for those complaints, could lead a rational factfinder to conclude that Romero knowingly condoned and ratified actions by Nguyen that he reasonably should have known would cause constitutional injuries like the ones Blankenhorn may have suffered."); Whitfield v. Melendez-Rivera, 431 F.3d 1, 14 (1st Cir. 2005) ("Supervisors may only be held liable under § 1983 on the basis of their own acts or omissions. Supervisory liability can be grounded on either the supervisor's direct participation in the unconstitutional conduct, or through conduct that amounts to condonation or tacit authorization. Absent direct participation, a supervisor may only be held liable where '(1) the behavior of [his] subordinates results in a constitutional violation and (2) the [supervisor's] action or inaction was "*affirmatively linked*" to the behavior in the sense that it could be characterized as "supervisory encouragement, condonation or acquiescence" or "gross negligence. . . amounting to deliberate indifference."' " (internal citations omitted) (emphasis in original)); Atteberry v. Nocona Gen. Hosp., 430 F.3d 245, 254, 256 (5th Cir. 2005) ("Ordinarily, supervisors may not be held vicariously liable for constitutional violations committed by subordinate employees. . . . Deliberate indifference in this context 'describes a state of mind more blameworthy than negligence.' [citing *Farmer* and *Estelle*] Accordingly, to prevail against either Norris or Perry, the Plaintiffs must allege, *inter alia*, that Norris or Perry, as the case may be, had subjective knowledge of a serious risk of harm to the patients. . . . In sum, the Plaintiffs alleged that Norris and Perry knew both that a dangerous drug was missing and that patients were dying at an unusually high rate. They also alleged that although Norris and Perry should and could have investigated the deaths and missing drugs or changed hospital policy, they did nothing for a considerable period of time. For Rule 12(b)(6) purposes, the requisite deliberate indifference is sufficiently alleged."); Doe *ex rel*. Doe v. City of Roseville, 296 F.3d 431, 441 (6th Cir. 2002) (Discussing standards of supervisory liability among the Circuits and concluding that "[a]lthough Jane had a constitutional right to be free from sexual abuse at the hands of a school teacher or official, she did not have a constitutional right to be free from negligence in the supervision of the teacher who is alleged to have actually abused her. Negligence is not enough to impose section 1983 liability on a supervisor."); Carter v. Morris, 164 F.3d 215, 221 (4th Cir. 1999) ("A plaintiff must show actual or constructive knowledge of a risk of constitutional injury, deliberate indifference to that risk, and 'an "affirmative causal link" between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff.' " (quoting Shaw v. Stroud, 13 F.3d 791, 799 (4th Cir. 1994)); Camilo-Robles v. Hoyos, 151 F.3d 1, 7 (1st Cir. 1998) ("Notice is a salient consideration in determining the existence of supervisory liability. Nonetheless, supervisory liability does not require a showing that the supervisor had actual knowledge of the offending behavior; he 'may be liable for the foreseeable consequences of such conduct if he would have known of it but for his deliberate indifference or willful blindness.' To demonstrate deliberate indifference a plaintiff must show (1) a grave risk of harm, (2) the defendant's actual or constructive knowledge of that risk, and (3) his failure to take easily available measures to address the risk. . . . [T]he plaintiff must 'affirmatively connect the supervisor's conduct to the subordinate's violative act or omission.' This affirmative connection need not take the form of knowing sanction, but may include tacit approval of, acquiescence in, or purposeful disregard of, rights-violating conduct." (internal citations omitted)); Lankford v. City of Hobart, 73 F.3d 283, 287 (10th Cir. 1996) (following Third Circuit approach and requiring personal direction or actual knowledge for supervisory liability); Baker v. Monroe Twp., 50 F.3d 1186, 1194 n.5 (3d Cir. 1995) (applying Third Circuit standard which requires "actual knowledge and acquiescence" and noting that other circuits have broader standards for supervisory liability) (quoting Anderson v. Creighton, 438 U.S. 638 (1987)); Howard v. Adkison, 887 F.2d 134, 137,138 (8th Cir. 1989) (supervisors liable when inaction amounts to reckless disregard, deliberate indifference to or tacit authorization of constitutional violations); Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553, 562 (1st Cir. 1989) (supervisor's conduct or inaction must be shown to amount to deliberate, reckless or callous indifference to constitutional rights of others);

possible tests for supervisory liability"[16] that can be gleaned from lower court decisions, ranging from actual knowledge and acquiescence[17] to gross negligence.[18] Many courts analyze supervisory liability for inaction in much the same way municipal liability for failure to train is analyzed under *City of Canton v. Harris*.[19] In *City of Canton*, the Court unanimously rejected the City's argument that municipal liability can be imposed only where the challenged policy is itself unconstitutional and concluded that "there are limited circumstances in which an allegation of a 'failure to train' can be the basis for liability under § 1983."[20] Noting substantial disagreement among the lower courts as to the level of culpability required in "failure to train" cases, the Court went on to hold that "the inadequacy of training policy may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact."[21] The *City of Canton* "deliberate indifference" standard

Meriwether v. Coughlin, 879 F.2d 1037, 1048 (2d Cir. 1989) ("[S]upervisory liability may be imposed when an official has actual or constructive notice of unconstitutional practices and demonstrates 'gross negligence' or 'deliberate indifference' by failing to act." (citing McCann v. Coughlin, 689 F.2d 112, 125 (2d Cir. 1983)); Rascon v. Hardiman, 803 F.2d 269, 274 (7th Cir. 1986) (noting supervisory liability requires showing that "official knowingly, willfully, or at least recklessly caused the alleged deprivation by his action or failure to act.").

16. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1958 (2009) (Souter, J., joined by Stevens, J., Ginsburg, J., Breyer, J., dissenting).

17. *See, e.g.*, Baker v. Monroe Twp., 50 F.3d 1186, 1194 (3d Cir. 1995).

18. *See, e.g.*, Lipsett v. Univ. of Puerto Rico, 864 F.2d 881, 902 (1st Cir. 1988). *But see Doe*, 296 F.3d at 441 (Discussing standards of supervisory liability among the Circuits and concluding that "[a]lthough Jane had a constitutional right to be free from sexual abuse at the hands of a school teacher or official, she did not have a constitutional right to be free from negligence in the supervision of the teacher who is alleged to have actually abused her. Negligence is not enough to impose section 1983 liability on a supervisor.").

19. City of Canton v. Harris, 489 U.S. 378 (1989). In *Greason v. Kemp,* 891 F.2d 829 (11th Cir. 1990), for example, the Eleventh Circuit found the Supreme Court's analysis in *City of Canton* provided a helpful analogy in determining whether a supervisory official was deliberately indifferent to an inmate's psychiatric needs. The court held that a three-prong test must be applied in determining a supervisor's liability: "(1) whether, in failing adequately to train and supervise subordinates, he was deliberately indifferent to an inmate's mental health care needs; (2) whether a reasonable person in the supervisor's position would know that his failure to train and supervise reflected deliberate indifference; and (3) whether his conduct was causally related to the constitutional infringement by his subordinate." *Id*. at 836, 837. Post-*Iqbal* cases continue to analogize supervisory liability to municipal liability under *City of Canton. See, e.g.*, Hamilton v. White, No. ED CV 09-02213-PA (VBK), 2010 WL 5348759, at *10 (C.D. Cal. Dec. 17, 2010) (A 'failure to train' theory can be the basis for a supervisor's liability under § 1983 in only limited circumstances. *See City of Canton*, 489 U.S. at 387-90 (liability only where failure to train amounts to deliberate indifference).).

20. *City of Canton*, 489 U.S. at 387.

21. *Id*. at 388.

is based on a construction of the § 1983 causation language, and it is clear that the statutory standard has nothing to do with the level of culpability that may be required to make out the underlying constitutional wrong. The Court in *City of Canton* decided that deliberate indifference is what is required to establish the municipal policy as the "moving force" behind or "cause of" the constitutional violation.[22] As the Court later explained, the "term was used in the *Canton* case for the . . . purpose of identifying the threshold for holding a city responsible for the constitutional torts committed by its inadequately trained agents."[23]

In *Farmer v. Brennan*,[24] acknowledging that "considerable conceptual difficulty would attend any search for the subjective state of mind of a governmental entity, as distinct from that of a governmental official[,]"[25] the Supreme Court distinguished the objective deliberate indifference standard established in *City of Canton* for holding governmental entities accountable for constitutional torts committed by employees from the subjective deliberate indifference standard[26] required for constitutional culpability of an individual defendant under the Eighth Amendment in prison conditions cases. The Court observed that

> It would be hard to describe the *Canton* understanding of deliberate indifference, permitting liability to be premised on obviousness or constructive notice, as anything but objective. *Canton's* objective standard, however, is not an appropriate test for determining the liability of prison officials under the Eighth Amendment as interpreted in our cases.[27]

22. *Id*. at 389 n.8.
23. Collins v. Harker Heights, 503 U.S. 115, 124 (1992).
24. 511 U.S. 825 (1994).
25. *Id*. at 841.
26. The subjective deliberate indifference standard requires a finding that the official had "actual knowledge" of the risk, threat, medical need, etc. and failed to take appropriate steps to abate the problem. *Id.* at 838-43 (discussing requirements of subjective deliberate indifference). The Court advised that "[i]t is not enough merely to find that a reasonable person would have known, or that the defendant should have known, and juries should be instructed accordingly." *Id*. at 843 n.8.
27. *Id*. at 841. The Court held "that a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." *Id*. at 847. As the court of appeals explained in *Gibson v. County of Washoe*:

> Because the Eighth Amendment's deliberate indifference standard looks to the subjective mental state of the person charged with violating a detainee's right to medical treatment, it—somewhat confusingly—differs from the *Canton* deliberate indifference standard, which we also apply in this opinion. The *Canton* deliberate indifference standard does not "turn upon the degree of fault (if any) that a plaintiff must show to make out an underlying claim of a constitutional violation;"instead it is used to determine when a municipality's omissions expose it to liability for the federal torts committed by its employees. . . As opposed to the *Farmer* standard, which does not impose liability unless a person has actual notice of conditions that pose a

While acknowledging that "the concept of constructive knowledge is familiar enough that the term 'deliberate indifference' would not, of its own force, preclude a scheme that conclusively presumed awareness from a risk's obviousness[,]"[28] the Court in *Farmer* insisted on actual subjective knowledge to satisfy the deliberate indifference standard under the Eighth Amendment because "a subjective approach isolates those who inflict punishment."[29] Justice Souter went on to clarify, however, that proof of actual knowledge could be made out through circumstantial evidence:

> Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence. . .and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.[30]

III. Post-*Iqbal:* Courts Still Sorting It Out

In the wake of *Iqbal*, there have been few appellate cases with extensive discussions of the supervisory liability issue. The First, Third, and Eighth Circuits have suggested that the Supreme Court's decision may call into question prior circuit law on the standard for holding a public official liable for damages under § 1983 on a theory of supervisory liability.[31] The Eleventh Circuit continues to rely on pre-*Iqbal* prece-

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substantial risk of serious harm, the *Canton* standard assigns liability even when a municipality has constructive notice that it needs to remedy its omissions in order to avoid violations of constitutional rights.

290 F.3d 1175, 1188 n.8 (9th Cir. 2002).

28. *Farmer*, 511 U.S. at 840.

29. *Id*. at 839.

30. *Id*. at 842. Justice Souter went on to elaborate:

> While the obviousness of a risk is not conclusive and a prison official may show that the obvious escaped him,. . . he would not escape liability if the evidence showed that he merely refused to verify underlying facts that he strongly suspected to be true, or declined to confirm inferences of risk that he strongly suspected to exist (as when a prison official is aware of a high probability of facts indicating that one prisoner has planned an attack on another but resists opportunities to obtain final confirmation; or when a prison official knows that some diseases are communicable and that a single needle is being used to administer flu shots to prisoners but refuses to listen to a subordinate who he strongly suspects will attempt to explain the associated risk of transmitting disease).

Id. at 843 n.8.

31. *See* Parrish v. Ball, 594 F.3d 993, 1001 n.1 (8th Cir. 2010) ("The Supreme Court's recent pronouncement in *Iqbal* may further restrict the incidents in which the 'failure to supervise' will result in liability."); Bayer v. Monroe Cnty. Children & Youth Servs., 577 F.3d 186, 191 n.5 (3d Cir. 2009) ("In light of the Supreme Court's recent decision in *Ashcroft v. Iqbal* . . . it is uncertain whether proof of such personal knowledge, with nothing more, would provide a sufficient basis for holding Bahl liable with respect to plaintiffs' Fourteenth Amendment claims under § 1983."); Maldonado v. Fontanes, 568 F.3d 263, 275 n.7 (1st Cir. 2009) ("Some recent language from the Supreme Court may

dent that allows for supervisory liability where a supervisor personally participates in the constitutional violation or where there is a causal connection between the unconstitutional conduct and the supervisor's action or inaction.[32]

In *al-Kidd v. Ashcroft*,[33] the Ninth Circuit denied a motion to dismiss a claim against former Attorney General Ashcroft where plaintiff alleged that Ashcroft had "developed and promulgated a policy by which the FBI and DOJ would use the federal material witness statute as a pretext 'to arrest and detain terrorism *suspects* about whom they did not have sufficient evidence to arrest on criminal charges but wished to hold preventatively or to investigate further.' "[34] As Judge Smith, the author of the panel opinion, noted in his concurrence to the denial of a rehearing en banc, "[a]ccepting al-Kidd's factual allegations as true, . . . we concluded that Ashcroft created, authorized, supervised, and enforced a policy that used the material witness statute in contravention of the Fourth Amendment, and that Ashcroft directly violated the material witness statute by his own personal involvement with the challenged policy."[35] The Supreme Court has granted certiorari in *al-Kidd* on ques-

call into question our prior circuit law on the standard for holding a public official liable for damages under § 1983 on a theory of supervisory liability."); *see also* Lewis v. Tripp, 604 F.3d 1221, 1226, 1227 & n.3 (10th Cir. 2010) (refusing to "stake out a position" in the debate about *Iqbal*'s impact on supervisory liability standard where claim failed even under pre-*Iqbal* standard); Sanchez v. Pereira-Castillo, 590 F.3d 31, 48, 49 (1st Cir. 2009) (holding no plausible supervisory liability claim stated against administrative correctional officials where plaintiff merely parroted standard for supervisory liability).

32. *See, e.g.*, AFL-CIO v. City of Miami, 637 F.3d 1178, 1190 (11th Cir. 2011); Doe v. School Bd. of Broward Cnty., 604 F.3d 1248, 1266, 1267 (11th Cir. 2010); Keating v. City of Miami, 598 F.3d 753, 763-65 (11th Cir. 2010); Harper v. Lawrence Cnty., 592 F.3d 1227, 1236-37 (11th Cir. 2010); Bryant v. Jones, 575 F.3d 1281, 1299-1300 (11th Cir. 2009).

33. 580 F.3d 949, 965, 976 n.25 (9th Cir. 2009), *reh'g en banc denied*, Ashcroft v. al-Kidd, 598 F.3d 1129 (9th Cir. 2010), *cert. granted in part by* Ashcroft v. al-Kidd, 131 S. Ct. 415 (2010).

34. *al-Kidd*, 580 F.3d at 965 (emphasis in original). The federal material witness statute, 18 U.S.C. § 3144 (West, Westlaw through 1986 Acts), provides:

> If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

35. 598 F.3d 1129, 1136 (9th Cir. 2010) (M. Smith, J., *concurring in the denial of reh'g en banc*), *cert. granted in part by* Ashcroft v. al-Kidd, 131 S. Ct. 415 (2010).

tions of absolute and qualified immunity for Ashcroft, but declined certiorari on the question going to the sufficiency of the complaint's allegations with respect to supervisory liability.[36]

In a recent Ninth Circuit decision, *Starr v. Baca*,[37] the plaintiff was a former county jail inmate who alleged that he had been beaten by a deputy sheriff while other deputies looked on. The complaint also alleged that there had been numerous incidents in which inmates in county jails had been killed or injured because of such conduct on the part of the Sheriff's deputies, and that, despite having been given notice of such wrongful conduct by his subordinates, the Sheriff did nothing to protect inmates under his care.[38] In evaluating the claim of supervisory liability against Sheriff Baca, the court stated:

> We see nothing in *Iqbal* that indicates that the Supreme Court intended to overturn longstanding case law on deliberate indifference claims against supervisors in conditions of confinement cases. We also note that, to the extent that our sister circuits have confronted this question, they have agreed with our interpretation of *Iqbal*. [citing *Dodds v. Richardson*, 614 F.3d 1185, 1204 (10th Cir. 2010), *Sandra T. E. v. Grindle*, 599 F.3d 583, 591 (7th Cir. 2010), and *Sanchez v. Pereira-Castillo*, 590 F.3d 31, 49 (1st Cir. 2009)] We therefore conclude that where the applicable constitutional standard is deliberate indifference, a plaintiff may state a claim for supervisory liability based upon the supervisor's knowledge of and acquiescence in unconstitutional conduct by others.[39]

In *T.E. v. Grindle*,[40] the Seventh Circuit addressed supervisory liability in the context of an interlocutory appeal by a school principal who was denied qualified immunity with respect to both equal protection and substantive due process claims arising from the sexual abuse of female students by a music teacher. The court noted that after *Iqbal*, the plaintiff would have to make out a showing of intentional discrimination on the equal protection claim to hold the supervisor liable.[41] Thus, while the court's precedent "would have previously allowed a plaintiff to recover from a supervisor based on that supervisor's 'deliberate indifference' toward a subordinate's purposeful discrimination, . . . after *Iqbal* a plaintiff must also show that the supervisor possessed the requisite dis-

36. Ashcroft v. al-Kidd, 131 S. Ct. 415 (2010), (granting certiorari as to questions 1 and 2 presented by the petition, but denying certiorari as to the question of "Whether the former Attorney General may be held liable for the alleged false statements in the affidavit supporting the material witness warrant, even though the complaint does not allege that he either participated in the preparation of the affidavit or implemented any policy encouraging such alleged misconduct.").

37. Starr v. Baca, 633 F. 3d 1191 (9th Cir. 2011).

38. *Id*. at 1205.

39. *Id*. at 1196.

40. T.E. v. Grindle, 599 F.3d 583 (7th Cir. 2010).

41. *Id*. at 588.

criminatory intent."[42] The court went on to find that there was sufficient evidence from which a jury could find that the principal knew about the teacher's abuse and acted deliberately to cover it up.[43] Based on this evidence, "a jury could reasonably infer—though it would not be required to infer-that [the principal] also had a purpose of discriminating against the girls based on their gender."[44] Turning to the substantive due process claim, the court found that the plaintiffs' allegations were not based on a theory of supervisory liability for a failure to act, but rather were directed at the principal's own misconduct in depriving them of "their constitutional right to bodily integrity."[45] The plaintiffs alleged that the principal "actively conceal[ed] reports of abuse and creat[ed] an atmosphere that allowed abuse to flourish."[46] The court concluded that "[w]hen a state actor's deliberate indifference deprives someone of his or her protected liberty interest in bodily integrity, that actor violates the Constitution, regardless of whether the actor is a supervisor or subordinate, and the actor may be held liable for the resulting harm."[47]

The most extensive treatment of supervisory liability post-*Iqbal* appears in the Tenth Circuit opinion of *Dodds v. Richardson*.[48] The plaintiff in *Dodds* sued a county sheriff who he claimed caused a violation of his constitutional rights by being deliberately indifferent to a policy of not allowing bail set in an arrest warrant to be posted after hours or until the arrestee had been arraigned by a judge, which policy resulted in plaintiff's unjustified weekend detention after bail had been set.[49] The defendant, relying on *Iqbal*, argued that he could not be held liable unless "he personally participated in such a violation with a sufficiently culpable state of mind."[50] Noting that "[d]efendant's argument implicates important questions about the continuing vitality of supervisory liability under § 1983 after the Supreme Court's recent decision in *Ashcroft v. Iqbal*[,]"[51] the court relied on the "causes to be subjected" language of § 1983 to conclude that personal involvement does not require direct participation in the constitutional violation.[52] The court explained:

42. *Id*.
43. *Id*. at 588-89.
44. *Id*. at 589.
45. *T.E.*, 599 F.3d at 590.
46. *Id*.
47. *Id*. at 591.
48. 614 F.3d 1185 (10th Cir. 2010).
49. *Id*. at 1189.
50. *Id*. at 1194.
51. *Id*.
52. *Id*. at 1195.

> Whatever else can be said about *Iqbal*, and certainly much can be said, we conclude the following basis of § 1983 liability survived it and ultimately resolves this case: § 1983 allows a plaintiff to impose liability upon a defendant-supervisor who creates, promulgates, implements, or in some other way possesses responsibility for the continued operation of a policy the enforcement (by the defendant-supervisor or her subordinates) of which 'subjects, or causes to be subjected' that plaintiff 'to the deprivation of any rights . . . secured by the Constitution. . . .' A plaintiff may therefore succeed in a § 1983 suit against a defendant-supervisor by demonstrating: (1) the defendant promulgated, created, implemented or possessed responsibility for the continued operation of a policy that (2) caused the complained of constitutional harm, and (3) acted with the state of mind required to establish the alleged constitutional deprivation.[53]

The court found sufficient evidence to support the first two requirements, active maintenance of the policy and causation of the constitutional injury,[54] and then proceeded to address the question of whether the defendant acted with the requisite state of mind required to violate plaintiff's substantive due process right to post preset bail and not be subject to overdetention.[55] The court concluded that after *Iqbal*, a showing of deliberate indifference or knowledge and acquiescence would no longer suffice to establish supervisory liability "*unless* that is the same state of mind required for the constitutional" violation alleged.[56] Because neither party challenged the district court's determination that deliberate indifference was the applicable standard, the court of appeals assumed (but did not decide) that "deliberate indifference constitutes the requisite state of mind."[57] Significantly, the "deliberate indifference" required in *Dodds* is of the subjective or constitutional type, not the *City of Canton* statutory or objective type.[58] In concluding that plaintiff had presented enough facts to support the conclusion that the defendant had acted with deliberate indifference, the court relied on two cases that involved Fourteenth Amendment due process violations where plaintiffs were required to show that a defendant supervisor had actual subjective knowledge of the risk of constitutional injury and disregarded the risk.[59]

In another recent decision, the Tenth Circuit Court of Appeals summed up *Iqbal's* message on supervisory liability by stating, "Simply put, there's no special rule of liability for supervisors. The test for

53. *Dodds*, 614 F.3d at 1199.
54. *Id*. at 1204.
55. *Id*.
56. *Id*. (emphasis added).
57. *Id*. at 1205.
58. *Dodds*, 614 F.3d at 1205.
59. *Id*. at 1205, 1206 (citing Campbell v. Johnson, 586 F.3d 835, 840 (11th Cir. 2009) and Serna v. Colo. Dep't of Corrs., 455 F.3d 1146, 1154-55 (10th Cir. 2006)).

them is the same as the test for everyone else."[60] Simply put, I think this is right only when the supervisor is being sued as a direct participant in the underlying constitutional violation but wrong when the supervisor is being sued for a failure to supervise, train, discipline, or a failure to take corrective action regarding known constitutional wrongdoing by subordinates and such failure in carrying out his or her "superintendent responsibilities"[61] is alleged to be the cause of the underlying constitutional violation committed by subordinates.

IV. A Proposal for a Unified Theory of Supervisory Liability

In his concurring opinion in *Dodds*, Judge Tymkovich bemoaned the fact that *Iqbal* "muddied further these already cloudy waters" and "unfortunately did not provide a unified theory for the variety of supervisory liability cases we face."[62] Much of the confusion and misunderstanding surrounding supervisory liability stems from the transformative or hybrid nature of supervisors. Supervisors often act with and like "line" officers or other non-policymaking employees and directly engage in the conduct that effects the constitutional violation. As such, they are clearly direct participants in the constitutional wrongdoing.[63] They should also be considered direct participants when they give an order to engage in unconstitutional conduct or, as in *Dodds*, when they adopt, maintain, or implement an unconstitutional policy that results in constitutional violations. In either case, "the test for them" should be "the same as the test for everyone else."[64] So, if a supervisor takes part in an unlawful search or seizure or gives an order to make an unlawful entry into someone's home or to use excessive force on a suspect, or adopts or implements an

60. Porro v. Barnes, 624 F.3d 1322, 1328 (10th Cir. 2010).
61. *Iqbal*, 129 S. Ct. at 1949.
62. *Dodds*, 614 F.3d at 1209-10.
63. *See, e.g.*, Sanchez v. Pereira-Castillo, 590 F.3d 31, 49 (1st Cir. 2009) ("In the context of Section 1983 actions, supervisory liability typically arises in one of two ways: either the supervisor may be a 'primary violator or direct participant in the rights-violating incident,' or liability may attach 'if a responsible official supervises, trains, or hires a subordinate with deliberate indifference toward the possibility that deficient performance of the task eventually may contribute to a civil rights deprivation.' " (citing Camilo-Robles v. Zapata, 175 F.3d 41, 44 (1st Cir.1999)); Miller v. Hamm, Civil No. CCB-10-243, 2011 WL 9185, at *12 (D. Md. Jan. 3, 2011) ("To the extent that the pleadings support Stakem-Hornig's liability, it is not as a supervisor, but as an active participant in the decision to deny Miller a name-clearing hearing. As a result, the motion to dismiss the claim of supervisory liability will be granted as to Stakem-Hornig.").
64. *Porro*, 624 F.3d at 1328.

unconstitutional strip search policy, the supervisor should be liable for the unreasonable search or seizure under the same Fourth Amendment standard that would apply to the line officers.[65] Likewise, the principal in *T.E.* could be held liable for a substantive due process violation of a student's protected liberty interest in bodily integrity by directly engaging in conduct that was knowingly and deliberately indifferent to such an interest. Frankly, I think such cases were not problematic before *Iqbal* and are certainly consistent with *Iqbal's* view of when supervisors may be held liable in a *Bivens* action or under § 1983.

When supervisors are not direct participants, however, as when they are not on the scene nor directly involved through the giving of an order to engage in unconstitutional conduct or through the adoption or implementation of an unconstitutional policy, their liability, if any, will be based on inaction or acts of omission. As Judge Tymkovich put it, "some cases say a supervisor may cause violations when he or she has actual knowledge of past constitutional violations being carried out by a subordinate, and does nothing to stop future occurrences."[66] Some inaction cases are based on a failure to train, supervise, or discipline that must be causally linked to the subordinate's constitutional wrongdoing. These "failure-to-___" claims are the ones that are being challenged by defendants after *Iqbal*.[67] As supervisors who are charged with a "failure to ___," these individual defendants have routinely been treated by many federal courts in the same way that local government entities have been treated for a "failure to ____" under *City of Canton*.[68] While I support a theory of supervisory liability for supervisory inaction that causes constitutional torts to be committed by subordinates, after *Iqbal*, courts may err by applying the *City of Canton* deliberate indifference standard to hold supervisors personally liable in such cases.

65. Note that in an Eighth Amendment excessive force case, a supervisor might act maliciously and sadistically in giving an order to use excessive force on a prisoner. If the subordinate obeying the order does not act with the requisite state of mind for the Eighth Amendment excessive force violation, the supervisor may nonetheless be liable even where the subordinate is not. *See, e.g.*, Lawrence v. Bowersox, 297 F.3d 727, 733 (Eighth Cir. 2002) (not inconsistent for jury to find excessive force was used, but not maliciously and sadistically by person following orders; fact that lower-level officer was found not liable did not establish that supervisor was entitled to qualified immunity; "[o]rchestrating an unnecessary pepper spray shower violated clearly established rights of which a reasonable person should have known.").

66. *Dodds*, 614 F.3d at 1212.

67. *See, e.g.*, Diaz-Bernal v. Myers, No. 3:09cv1734 (SRU), 2010 WL 5211494, at *20 (D. Conn. Dec. 16, 2010) (collecting cases)("Courts split over whether a failure to train claim can be the basis for supervisory liability post-*Iqbal*.").

68. *See supra* note 19, and accompanying text.

Professors Sheldon Nahmod and Kit Kinports have both written excellent pieces about the supervisory liability aspect of *Iqbal*.[69] Professor Nahmod lays out an impressive defense of the decision and concludes that the Court "got it right" in *Iqbal* when it adopted what he characterizes as the "constitutional" approach to supervisory liability,[70] while Professor Kinports criticizes the majority's failure to recognize a theory of supervisory accountability based on deliberate indifference to constitutional violations committed by subordinates, a theory that is not based on respondeat superior but on the supervisor's own culpability in causing a constitutional injury.[71] Because no two law professors should ever be accused of agreeing about anything, I take a position that falls somewhere between the Nahmod and Kinports views.

In short, I agree with Professor Nahmod that supervisory liability, as a form of individual liability, should be based on a constitutional violation by the supervisor. This is clearly what *Iqbal* requires.[72] I also agree with Professor Kinports that deliberate indifference that "causes" one to be subjected to a constitutional violation by a subordinate should be actionable under the statutory language of § 1983, but I would be clear that the "deliberate indifference" standard is the "constitutional" one that requires a showing of actual subjective knowledge of a subordinate's wrongdoing and a failure to prevent, remedy, or address the problem.[73] As with the Eighth Amendment subjective knowledge stan-

69. Kit Kinports, Iqbal *and Supervisory Immunity*, 114 PENN. ST. L. REV. 1291 (2010); Sheldon Nahmod, *Constitutional Torts, Over-Deterrence and Supervisory Liability After* Iqbal, 14 LEWIS & CLARK L. REV. 279 (2010).

70. Nahmod, *supra* note 69, at 281 n.5, 309.

71. Kinports, *supra* note 69, at 1297.

72. Aschroft v. Iqbal, 129 S. Ct. 1937, 1940 (2009) ("Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.").

73. Prior to *Iqbal*, in cases involving supervisory liability for claims of deliberate indifference to medical or safety needs of prisoners or detainees, some courts required plaintiffs to prove that the supervisors, as well as their subordinates, acted with the subjective deliberate indifference required to state an Eighth or Fourteenth Amendment claim. *See, e.g.*, Boyd v. Knox, 47 F.3d 966, 968 n.1 (8th Cir. 1995) (rejecting plaintiff's argument—that a supervisor's corrective inaction could be found to constitute deliberate indifference toward the underlying constitutional violation if the supervisor knew or should have known of the violation—and applying the subjective standard of deliberate indifference, requiring proof of supervisors' actual knowledge of the violations to find them liable) (citing Farmer v. Brennan, 511 U.S. 825 (1994)); *see also* Atteberry v. Nocona Gen. Hosp., 430 F.3d 245, 255 (5th Cir. 2005) (noting that deliberate indifference in context of supervisory liability required showing of subjective knowledge of serious risk of harm to patients); Palmer v. Marion County, 327 F.3d 588, 594 (7th Cir. 2003) (requiring plaintiff to establish that sheriff actually knew that plaintiff was assigned to particular cell block and that sheriff inferred from that assignment that there was

dard in *Farmer*, the requisite standard for supervisory liability for "failure to ___" should be subject to proof through circumstantial evidence going to the obviousness of the problem.[74]

Under this theory of supervisory liability, the majority in *Iqbal*, requiring plaintiffs to allege and prove discriminatory purpose, would have "got[ten] it right" only if plaintiffs' claims against Ashcroft and Mueller were based on (1) their having engaged in the conduct that violated the plaintiffs' equal protection rights, or (2) their having ordered subordinates to engage in the rights-violating conduct, or (3) their having adopted or implemented policies that violated the Fourteenth Amendment equal protection clause.[75] Indeed, the allegations in the complaint pointed to this third theory for holding Ashcroft and Mueller liable.[76] In such case, the standard for them violating the equal protection clause should be the same as for everyone else. If, however, the claims against these officials were based on their failure to act in the face of known rights violations by subordinates, or a failure to train, supervise or discipline where the "clearly obvious consequence" of such failure would be to cause subordinates to engage in equal protection violations, then allegations of subjective deliberate indifference, actual knowledge and acquiescence, should have been enough. This would be true "supervisory" liability based on the supervisors' own misconduct, incorporating the constitutional standard for Fourteenth Amendment

substantial risk of serious harm to plaintiff). The cases relied on by the Tenth Circuit in *Dodds* took this approach to supervisory liability with respect to Fourteenth Amendment substantive due process claims. *See* Dodds v. Richardson, 614 F.3d 1185 (10th Cir. 2010). For post-*Iqbal* cases taking the same approach, see, e.g., Kennedy v. Hayes, No. 1:09-cv-01946 JLT (PC), 2010 WL 5440805, at *8 (E.D. Cal. Dec. 28, 2010) ("Here, Plaintiff seeks to impose liability on the A-Yard medical supervisor ("Doe 1") and the direct supervisor of defendant Hayes ("Doe 2"). . . However, Plaintiff has failed to allege these defendants knew of any alleged unlawful action. Furthermore, the deliberate indifference standard is met only when prison officials have actual knowledge; it is not sufficient to allege the defendants should have been aware of Plaintiff's medical needs. Finally, though Plaintiff states the supervisors acted with deliberate indifference, this conclusory statement, unsupported by any facts, is insufficient to state a claim."); Allen v. City of Grovetown, No. CV 110-022, 2010 WL 5330563, at *8 (S.D. Ga. Dec. 20, 2010) ("The crux of Plaintiff's claim against Defendant Robinson, individually, is that he failed to properly train or supervise Defendants Harden and Freeman in the methods of suicide prevention and thus directly contributed to Love's death. . . . Plaintiff neither alleges facts showing that the need for more or different training or supervision was 'obvious' nor facts that could be reasonably construed as putting Defendant Robinson on any kind of notice as to a need for corrective measures. For instance, Plaintiff has not cited to prior instances of suicide or suicide attempts at the Grovetown facility. Likewise, Plaintiff has not set forth any facts indicating that Defendant Robinson had any actual knowledge with regard to the nature of Love's risk of suicide.").

74. *See supra* note 30, and accompanying text.

75. *Nahmod, supra* note 69, at 309.

76. *Iqbal*, 129 S. Ct. at 1951.

substantive due process violations. Thus, in a case like *T.E.*, actual subjective knowledge and acquiescence by the principal in the sexual abuse of students by the teacher should have been sufficient to state a substantive due process claim against the principal for failure to supervise and discipline with respect to the conduct by the teacher that violated both equal protection and substantive due process rights of the students.

Supervisory inaction that is subjectively and deliberately indifferent to continued or future constitutional wrongdoing by subordinates should be treated as conduct that is itself violative of substantive due process, regardless of the underlying constitutional violation. Such a theory would be consistent with *Iqbal's* mandate that supervisors must be found to violate the Constitution before they can be held liable. It would also account for the different roles supervisors may play in the course of their employment, sometimes directly participating or being actively engaged in conduct that violates constitutional rights, and sometimes being implicated in wrongdoing only through inaction or a "failure to ____." Finally, imposing a *constitutional* standard of deliberate indifference on "failure-to-___" supervisory liability claims would be consistent with a *causation* standard of deliberate indifference for municipal liability claims premised on inaction, where individuals are not subject to damages liability in their personal capacity and where the Court has recognized the problems associated with trying to discern an entity's subjective state of mind.[77] It's time to unmuddy the waters of supervisory liability. A unified theory of liability that accounts for the hybrid role that supervisors play would be a move in the right direction.

77. *See supra* note 25, and accompanying text.